American International Assurance Co Ltd v Koay Fong Eng (Administrator of the estate of Ho Moh Koay, deceased)

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11-2-94(T)
ZULKEFLI J
12 FEBRUARY 1996

Insurance *— Life insurance — Formation of contract and commencement of cover — Conditions of payment in proposal form and cashier's receipt — Which are applicable — When insurance cover commences — Whether there was non-disclosure of material facts in proposal form — Burden of proof of non-disclosure upon insurance company*

The deceased signed a proposal form on his life insurance policy prepared by an agent of the appellant insurance company. He paid the first annual premium to the appellant the next day and the deceased was duly issued with a cashier's receipt. A few days later, the deceased passed away because of a stomach ailment. The life insurance policy in the name of the deceased was approved and issued by the appellant to the deceased after his death. The respondent who was the administrator of the deceased's estate submitted her claim to the appellant but it was rejected. The respondent filed this action to recover the insured amount. The trial magistrate allowed the claim and the appellant appealed. The issues before the court were whether the appellant was entitled to reject the life insurance policy of the deceased by reason that (i) the conditions of payment in the cashier's receipt and the declaration clause (C) in the proposal form apply to the deceased's claim; and (ii) the deceased did not disclose material facts when filling the proposal form. Declaration clause (C) states inter alia that the insurance shall not take effect unless and until a policy is issued and delivered and the first premium thereon actually paid in full provided that if any premium is made in cash at the time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply. On the other hand, the cashier's receipt stipulated that the said sum is received only for the account of the payor and the company is no way committed thereby to the acceptance therof for the purpose offered. The appellant also contended that there were two types of receipts issued by insurance companies, that of a cashier's receipt and a conditional binding receipt. A conditional binding receipt was like a cover note providing temporary insurance coverage until acceptance of the proposal. It contended that since only a cashier's receipt was issued in this case, there was no insurance coverage at all until acceptance of the proposal and payment of premium.

Held, dismissing the appeal:

1 The conditions relating to payment in the cashier's receipt only apply, according to the declaration clause (C) in the proposal form, if the premium is paid at the time of signing the proposal

forms. In this case, the payment for the premium and the signing of the proposal form were not contemporaneous (see pp 272I–273A).

2 The deceased was also not bound by the condition relating to payment in the cashier's receipt because at the time of signing the proposal form, the deceased had no knowledge of the conditions (see p 274A–B).

3 The issue of the conditional binding receipt was not pleaded at all in the statement of defence of the appellant and the appellant is therefore precluded from raising it as evidence at the trial or raising it by way of submission (see p 275C–D); *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 followed.

4 The burden of proof is on the appellant to show that the deceased failed to disclose material facts when signing the proposal form. As there is no evidence before the court that the contents of the proposal form were put or explained to the deceased, on balance of probability the deceased did not know the effect of the questions and as such, the questions were answered correctly and truthfully (see p 276B–C).

5 The deceased was not required to disclose the fact that he had a cough or respiratory problem because it was not a serious illness of the same genus as that mentioned in the questions of the proposal form (see p 277F).

[Bahasa Malaysia summary

Si mati telah menandatangani borang cadangan atas polisi insurans nyawa yang disediakan oleh ejen syarikat insurans perayu. Dia telah membayar premium tahunan yang pertama kepada perayu pada hari keesokannya dan si mati telah diisukan dengan wajarnya suatu resit juruwang. Beberapa hari kemudiannya, si mati telah meninggal dunia disebabkan penyakit perut. Polisi insurans nyawa atas nama si mati telah diluluskan dan diisukan oleh perayu kepada si mati selepas kematiannya. Responden yang merupakan pentadbir harta pusaka si mati telah mengemukakan tuntutan kepada perayu tetapi ianya telah ditolak. Responden telah memfailkan tindakan ini untuk mendapat kembali jumlah yang diinsurankan. Majistret perbicaraan telah membenarkan tuntutan tersebut dan perayu kini merayu. Isu di hadapan mahkamah adalah samada perayu berhak menolak polisi insuran nyawa si mati atas sebab bahawa (i) syarat-syarat pembayaran atas resit juruwang dan deklarasi fasal (C) dalam borang cadangan terpakai kepada tuntutan si mati; dan (ii) bahawa si mati telah tidak mendedahkan fakta-fakta material ketika mengisikan borang cadangan. Deklarasi fasal (C) menyatakan, inter alia, bahawa insurans tersebut tidak akan dijadikan effektif sehingga polisi diisukan dan dihantar dan premium pertama dibayar sepenuhnya asalkan bahwa jikalau mana-mana premium dibayar secara tunai pada masa

menandatangani permohonan ini dan resit bersyarat diisukan untuknya, maka terma-terma resit akan terpakai. Sebaliknya, resit juruwang menyatakan bahawa jumlah tersebut adalah diterima hanya untuk akaun pembayar dan syarikat adalah langsung tidak terikat kepada penerimaan tersebut untuk sebab yang ditawarkan. Perayu juga telah mengujahkan bahawa terdapatnya dua jenis resit yang diisukan oleh syarikat-syarikat insurans iaitu resit juruwang dan resit syarat mengikat. Resit syarat mengikat adalah seperti nota perlindungan yang memperuntukkan perlindungan insurans sementara sehingga penerimaan cadangan tersebut. Telah dihujahkan bahawa oleh kerana suatu resit juruwang sahaja yang telah diisukan dalam kes ini, maka tiada perlindungan insurans langsung sehingga penerimaan cadangan dan bayaran premium.

Diputuskan, menolak rayuan:

(1) Syarat-syarat berkaitan dengan bayaran dalam resit juruwang hanya terpakai, menurut deklarasi fasal (c) dalam borang cadangan, jikalau premium dibayar semasa menandatangani borang cadangan. Dalam kes ini, bayaran premium dan tindakan menandatangani borang cadangan tersebut tidak dibuat pada masa yang sama (lihat ms 272I–273A).

(2) Si mati juga tidak terikat oleh syarat berkaitan dengan bayaran dalam resit juruwang kerana pada masa menandatangani borang cadangan, si mati tidak ada pengetahuan akan syarat tersebut (lihat 274A-B); *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 diikut.

(3) Isu resit syarat terikat tidak dipohon langsung dalam pernyataan pembelaan perayu, maka itu perayu dihalang daripada mengemukakannya sebagai keterangan semasa perbicaraan ataupun sebagai hujahan (lihat ms 275C–D).

(4) Beban bukti terletak atas perayu untuk menunjukkan bahawa si mati gagal mendedahkan fakta-fakta material ketika menandatangani borang cadangan. Oleh kerana tiada keterangan di hadapan mahkamah untuk menunjukkan bahawa kandungan borang cadangan tersebut telah dikemukakan ataupun diterangakan kepada si mati, maka atas barangkalian imbangan, si mati telah tidak tahu akan kesan soalan-soalan tersebut. Maka soalan-soalan tersebut telah dijawab dengan betulnya dan secara jujur (lihat ms 276B–C).

(5) Si mati tidak diperlukan mendedahkan fakta bahawa dia menghidapi sakit batuk dan mempunyai masalah pernafasan kerana ia bukannya merupakan penyakit yang serius dan yang sama seperti yang disebutkan dalam soalan-soalan dalam borang cadangan (lihat ms 277F).

Cases referred to

A *Borhanuddin bin Haji Jantara & Anor v American International Assurance Co Ltd* [1987] 1 MLJ 22
HA Securities Sdn Bhd v Ng Kong Yeam [1993] 4 CLJ 433
Pacific & Orient Insurance Co Sdn Bhd v Kathirvelu [1992] 1 MLJ 249
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250

B **Legislation referred to**

Evidence Act 1950 ss 103, 114(g)

Mubashir bin Mansor (*Skrine & Co*) for the appellant.
C *K Subramaniam* (*Manjit Subra & Co*) for the respondent.

Zulkefli J: This is an appeal by the appellant insurance company against the decision of the learned trial magistrate at Taiping in allowing the claim of the respondent, the administrator of the estate of Ho Moh Koay ('the
D deceased') for payment of an assured sum of RM25,000 on a life insurance policy taken by the deceased from the appellant. The relevant facts of the case are as follows.

On 9 August 1983 the deceased signed a proposal form on his life insurance policy prepared by the appellant's agent. On 10 August 1983 the
E deceased made the first annual premium payment of a sum of RM657 to the appellant and the deceased was duly issued with a receipt known as 'cashier's receipt'. The deceased passed away on 13 August 1983 because of a stomach ailment. The life insurance policy in the name of the deceased was approved and issued by the appellant to the deceased on 19 August 1983. On 15 January 1984 the respondent who is the wife and the
F administrator of the estate of the deceased filed and submitted her claim to the appellant. On 18 June 1987 the appellant in a letter of reply to the respondent stated that it had gone through the claim made and stood by its earlier decision to deny liability. Arising from the appellant's decision in denying the liability on the said claim the respondent filed this action to
G recover the said sum of RM25,000 from the appellant.

The appellant in its defence contended that it had rejected the respondent's claim because in the course of processing the claim and making inquiries, the appellant discovered that:

(a) the deceased had died on 13 August 1983 before his application for
H the life insurance policy was received by the underwriting department of the appellant to be processed and approved;

(b) the answers provided by the deceased to question nos 25(a) and 26 of the proposal form were found by the appellant to be false.

Encik Mubashir, learned counsel for the appellant, submitted that based
I on the above two grounds the appellant was entitled to repudiate liability and hence the rejection of the claim. In rejecting the respondent's claim the appellant also relied on the declaration clause (C) as shown on the reverse side of the proposal form and the conditions of payment on the

cashier's receipt. The declaration clause (C) of the proposal form reads as follows:

> The insurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my life time and good health, provided, however, that if any payment or premium is made in cash at the time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply hereto and are agreed to.

Whereas, the cashier's receipt issued by the appellant to the deceased contained the following condition:

> Conditions Of Payment
>
> said sum is received only for the account of the payor, and the company is in no way committed thereby to the acceptance thereof for the purpose offered nor to any action in the premises and nothing herein or connected with the receipt of the said sum shall be held to waive default in payment of any premium, interest or other sum due, or to extend the time for payment of any premium, interest or other sum or in any manner to affect the rights of the company under any policy or contract of assurance or with respect to any application submitted to the company for group or individual assurance or otherwise. If the said amount be not accepted by the company for the purpose offered it will be returned to the payor in the usual course of business.
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> Any payment tendered otherwise than in cash is received for the account of the payor, subject to collection and the receipt of actual payment by the company.

Having perused the appeal record and the grounds of judgment of the learned trial magistrate, I find that on the evidence adduced before her, she did not err in law and in fact in arriving at the decision of allowing the respondent's claim. As I see it in this case, there are two main issues which the court has to decide:

(1) whether the appellant is entitled to reject the life insurance policy of the deceased by reason that the conditions of payment in the cashier's receipt and the declaration clause (C) in the proposal form apply to the deceased's claim; and

(2) whether the appellant is entitled to repudiate the contract of insurance by reason that the deceased did not disclose material facts when filling the proposal form.

The status of the conditions of payment in the cashier's receipt and the declaration clause (C) in the proposal form

I am of the view that the presence of the conditions of payment in the cashier's receipt and the declaration clause (C) in the proposal form did not give the appellant the right to repudiate the contract that had been formed and to reject the respondent's claim under the policy issued by the appellant on 19 August 1983. The learned trial magistrate in her judgment was right in concluding that the conditions relating to payment in the

A cashier's receipt only apply according to the declaration clause (C) in the proposal form if the premium is paid at the time of signing the proposal form. Therefore in this case the conditions relating to payment in the cashier's receipt are not applicable because the payment for the premium and the signing of the proposal form were not contemporaneous. In this context I agree with the learned trial magistrate that the Supreme Court's B decision in *Borhanuddin bin Haji Jantara & Anor v American International Assurance Co Ltd* [1987] 1 MLJ 22 applies to the facts of the present case.

The facts which give rise to the issue in *Borhanuddin*'s case are almost similar to those in the present case. In *Borhanuddin*'s case one Azian bte Borhanuddin (deceased) was a flight stewardess employed by Malaysian C Airline System (MAS). On 4 December 1977 she was on duty on MAS flight No MH 653 which crashed at Tanjung Kupang, Johor. All persons on board including Azian were killed. About two weeks before the crash on 21 November 1977 the deceased submitted a proposal form duly completed and signed by her to the insurance company proposing to insure her life for D a sum of RM50,000. The proposal form ended with a declaration containing a number of clauses one of which is the declaration clause (C) similar to that in the present case. Subsequently on 2 December 1977 the deceased paid to the insurance company a cash sum of RM118 and a receipt was issued by the insurance company. The receipt issued also contained the condition of payment similar to that in the cashier's receipt issued as in the E present case. Two days after making the cash payment the deceased died in the crash. When sued for the assured sums the insurance company relied on the declaration clause (C) of the proposal form and maintained there was no contract concluded, there being no policy issued and delivered as yet. His lordship Salleh Abbas LP in delivering the judgment of the F Supreme Court at p 23 had this to say:

> For the purpose of this judgment it is not necessary for us to go so far as to consider whether the condition (also described as the terms) of the receipt were part of the contract or not. Even assuming that they are so and therefore binding in the circumstances of this case they are immaterial because of two reasons. In the first place the cash payment, according to G PW1, the life underwriter employed by the insurance company, was payment of a premium.
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> Certainly the deceased must have intended it to be the first premium as no question of fee or deposit was ever involved. That being so it must be the first premium because there were no other payments preceding it. Secondly for the conditions (terms) of the receipt to be applicable, according to H declaration (C) the premium paid in cash must be so paid at the time of signing the proposal form and the conditional receipt therefore must also be issued at the same time. This requirement is clearly spelt out in the proviso to condition (C) as follows:
>
> 'provided however that if any payment or premium is made in cash at the I time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply hereto and are agreed to'.

In the present case the deceased signed the proposal form on 9 August 1983 and paid the premium on 10 August 1983. Accordingly the proviso

to declaration clause (C) of the proposal form did not apply to the deceased, applying the decision of the Supreme Court in *Borhanuddin*'s case where it was held that the conditions relating to payment in the cashier's receipt only apply if the deceased paid the premium at the time of signing the proposal form. I am also of the view that the deceased was not bound by the condition relating to payment in the cashier's receipt because at the time of signing the proposal form the deceased had no knowledge of the conditions. In this respect I find that the principle of the contra proferentum rule ought to operate against the appellant because the declaration clause (C) of the proposal form does not refer to the conditions relating to payment in cashier's receipt. It is only the proviso in the said declaration clause (C) of the proposal form that refers to conditions relating to payment, if the premium is paid in cash at the time of signing the application.

I find that on the evidence adduced the deceased had fulfilled his obligations by paying the first premium on 10 August 1983 during his life time. I also find that the deceased had paid the premium during his good health. The deceased must have been exempted from medical examination. This is so because there is no evidence adduced by the appellant that a medical check up was required. There was nothing more left for him to do before the appellant issued and handed over the policy which would probably take a considerable length of time. After the deceased had fulfilled his obligation by paying the first premium it was the responsibility of the appellant to issue the life insurance policy to the deceased. As a matter of fact in this case, the policy was issued on 19 August 1983.

Learned counsel for the appellant however attempted to submit before me that the Supreme Court decision in *Borhanuddin*'s case could have been decided in favour of the said insurance company in disclaiming its liability if certain material facts pertaining to the type of receipt issued by the insurance company had been canvassed before their lordships. It was contended for the appellant that before their lordships in *Borhanuddin*'s case it was not argued that there are two types of receipts issued by an insurance company, namely the cashier's receipt and the conditional binding receipt. It was submitted for the appellant that when a cashier's receipt is issued and not the conditional binding receipt it is clear that the intention of the parties is that the insurance cover is to begin only from the time of acceptance of the proposal and payment of premium and not from the moment the first premium is paid at any time before acceptance. If the latter was the intention, the conditional binding receipt would have been issued. It was stressed that this is the underlying scheme behind insurance companies using two different kind of receipts. It was contended for the appellant that a conditional binding receipt is just like a cover note providing a temporary insurance coverage until acceptance of the proposal. During the currency of the issuance of the conditional binding receipt the appellant submitted that the insurer remains on risk for the contingency for which temporary coverage is provided unless notice of termination of the conditional binding receipt is given earlier. In the present case, it was submitted for the appellant that since only the cashier's receipt was issued,

A it therefore follows that there was no insurance coverage at all until acceptance of the proposal and payment of premium.

With respect to the contention of learned counsel for the appellant on the issue of the conditional binding receipt not being canvassed before the Supreme Court in *Borhanuddin*'s case, I am of the view that the B appellant cannot raise it now before me by way of hypothesis that the Supreme Court then could have decided the other way round if the issue of the conditional binding receipt had been raised therein. I do not think that the Supreme Court's decision in *Borhanuddin*'s case can be said to be per incuriam. To date there has been no decision from another similar case decided by the Supreme Court (now the Federal Court) holding that the C decision in *Borhanuddin*'s case is per incuriam. As such the decision in *Borhanuddin*'s case still remains a binding precedent which I am bound to follow and apply to the facts of the present case. Furthermore I am also of the view that since the issue of the conditional binding receipt was not pleaded at all in the statement of the defence of the appellant the appellant D is therefore precluded from raising it as evidence at the trial or raising it by way of submission (see the case of *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 at pp 254–256). It is trite law that parties in a suit are bound by their own pleadings (see the case of *HA Securities Sdn Bhd v Ng Kong Yeam* [1993] 4 CLJ 433 at p 439). The court in this case is permitted to decide only on the issues that had been specifically raised by E the parties in their pleadings. In the circumstances I therefore have to reject the submission of the appellant on this issue of conditional binding receipt and the effect it would have on the outcome of this case.

Whether there was non-disclosure of material facts when filling proposal form

F The relevant questions in the proposal form which are the subject of dispute by the appellant in that the answers provided by the respondent were false are question nos 25(a) and 26 which read as follows:

> 25 Have you EVER had or been told you had or been treated for:
> (a) *tuberculosis, respiratory or lung disease?*
> (b) rheumatic fever, highblood pressure, chest pain, disease of heart, blood G or blood vessels?
> (c) ulcer or bowel liver or gall bladder disease?
> (d) renal stone or any disorder of the genital-urinary system?
> (e) epilepsy, mental or nervous disorder?
> (f) diabetes venereal disease, cancer, or any other disease, disorder or severe injury?
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> H
> 26 In the PAST FIVE YEARS, have you had any—
> (a) diagnostic test such as X-ray, electrocardiogram or blood study?
> (b) illness, operation, medical advice, hospital treatment not mentioned above?

I To all the above questions the deceased answered 'No'. The appellant contended that the answers provided were false. The appellant called Dr Saravana Dhoss (DW2) who was at the material time with the District Hospital Taiping to give evidence that the deceased had been treated as an out-patient at the said hospital on a number of occasions and that he had

upper respiratory tract infection and chronic cough. The appellant contended that the answers 'No' to question nos 25(a) and 26 were intentional suppression of facts clearly known to the deceased. The appellant further contended that a contract of insurance is one of uberrimae fidei and therefore non-disclosure or misrepresentation by the insured deceased would entitle the insurer to avoid the contract as there would have been a breach of a basis clause by the deceased. On this point I am of the view that the burden of proof is on the appellant to show that the deceased failed to disclose material facts when signing the proposal form. The proposal form was filled by the appellant's agent and signed by the deceased. The agent was not called to give evidence relating to question nos 25(a) and 26 in the proposal form. The question arises whether the agent had put question nos 25(a) and 26 to the deceased before he signed the proposal form or whether the agent had explained the effect of the questions to the deceased. These questions could not be answered since the appellant failed to call the agent to give evidence although there is evidence shown that the agent is still working for the appellant. In the circumstances I would agree with the submission of Encik Subramaniam, learned counsel for the respondent that the provision of s 114(g) of the Evidence Act 1950 be invoked against the appellant in that if the agent had been called, his evidence would not have been favourable to the appellant's case. On this issue I find that the learned trial magistrate was right in her finding when she stated that the burden is on the appellant to prove that the deceased had failed to disclose material facts when signing the proposal form because this issue of non-disclosure was raised by the appellant. This finding is consistent with the requirement of the provision of s 103 of the Evidence Act 1950 which states that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. As there is no evidence before the court that the contents of the proposal form in particular relating to question nos 25(a) and 26 were put or explained to the deceased, I find that on a balance of probability the deceased did not know the effect of question nos 25(a) and 26 and as such the questions were answered correctly and truthfully.

The testimony of Dr Saravana Dhoss (DW2) in my view supports the finding that the deceased had answered question nos 25(a) and 26 correctly and truthfully. DW2 in cross-examination had said, inter alia, the following:

> I agree that he came and saw me and other doctors for a minor ailment. No hospitalization was required and he was treated as an outpatient ... He was basically healthy.

The evidence of DW2 above would show that the deceased did not know or have reason to believe he was suffering from the illness mentioned in question no 25(a). I am of the view that a layman like the deceased would accept the opinion of the doctor and believe that he had no cause for alarm. There is also no evidence that the deceased was informed or had knowledge as to what should be done to him. At the very least the appellant should have produced a medical report from the hospital if there

A was any to show that such diagnostic test or examination have been carried out on the deceased since the appellant is required to prove that the deceased did not disclose material facts in the proposal form. The appellant in my view has failed to discharge this onus in the circumstances of this case.

B In the present case it is also noted that Victor Oorjitham (DW1) the legal adviser of the appellant who gave evidence, stated that question nos 20–28 of the proposal form are not exhaustive in that the questions do not include all illnesses. DW1 also agreed that it is impossible to enumerate all illnesses in the proposal form. Based on DW1's evidence I am of the view that the deceased was only required to disclose serious illnesses in the C proposal form. It is important that a fair and reasonable construction be placed on question nos 25 and 26 in the proposal form and the answers given by the deceased. On this point I would refer to the case of *Pacific & Orient Insurance Co Sdn Bhd v Karthivelu* [1992] 1 MLJ 249 where Gunn Chit Tuan SCJ (as he then was) in delivering the judgment of the Supreme D Court at p 260 had this to say:

> Applying a fair and reasonable construction on that question in the proposal form, we therefore do not consider as a matter of fact that it was material for the respondent to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned E earlier in the said question. Here again we agree with the learned judge that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts.

In the present case DW2 had given evidence that the deceased only had minor ailment and no hospitalization was required. This means that the F deceased did not suffer any serious illness. Accordingly, I am of the view that following the decision in *Karthivelu*'s case the deceased was not required to disclose the fact that he had a cough or respiratory problem because it was not a serious illness of the same genus as that mentioned in the said question no 25(a) of the proposal form.

G In the circumstances of this case and on the evidence before the learned trial magistrate I find that the learned trial magistrate had arrived at a correct decision in allowing the claim of the respondent. I therefore dismiss this appeal with cost.

Appeal dismissed with costs

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Reported by Ng Sheau Jiuan

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